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No. 97-1287

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

HUGHES AIRCRAFT COMPANY AND HUGHES NON-BARGAINING RETIREMENT PLAN,

Petitioners,

v.

STANLEY I. JACOBSON, DANIEL P. WELSH, ROBERT E. MCMILLIN, ERNEST O. BLANDIN, AND RICHARD E. HOOK,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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REPLY TO BRIEF IN OPPOSITION

1. Notwithstanding respondents' efforts to conjure up factual and legal complexity, this case hinges on a straightforward question: do participants in a defined-benefit plan have any pre-termination right to plan assets in excess of their defined benefits? The answer to that question is plainly no. Respondents, as participants in a defined-benefit plan, are entitled to their defined benefits — no more and no less.

The opinion below, over a vigorous dissent by Judge Norris, created a welter of circuit conflicts, and cannot reasonably be reconciled with this Court's decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996). Rather than harmonizing these conflicts, the brief in opposition only confirms them. That brief reaffirms the Ninth Circuit's holdings that (1) an employer's discretion to amend a contributory plan is subject to significant, but nonstatutory, limitations, and (2) a plan amendment can be challenged after the fact as an involuntary (indeed, unintentional) plan termination. Neither conclusion can be squared with the text, structure, or purpose of ERISA or the general body of law interpreting the statute. Indeed, the Pension Benefit Guaranty Corporation ("PBGC") — the federal agency that administers and enforces Title IV of ERISA — has filed an *amicus curiae* brief urging this Court to grant review.[1]

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[1] Respondents seek to avoid review by emphasizing the procedural posture of this case, which arises on a motion to dismiss the complaint under Fed. R. Civ. P. 12(b)(6). That emphasis is misplaced. This case is ripe for review because respondents have failed to state claims upon which relief can be granted *as a matter of law*. No further factual development is necessary or appropriate, because respondents' claims are simply not cognizable under ERISA. Indeed, this Court routinely grants review in cases from the lower federal courts in this posture, including some of the leading ERISA precedents. *See, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513 (1997); *Lockheed Corp. v. Spink*, 116 S. Ct. 1783 (1996); *Schneider Moving & Storage Co. v. Robbins*, 466 U.S. 364 (1984); *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551 (1979).

2. Respondents first defend the panel majority's holding that ERISA implicitly limits an employer's discretion to amend contributory plans. According to respondents, the conflict between the decision below and the cases cited in the petition should be ignored because those cases predate *Spink*. *See* Opp. 21-22. That contention misses the mark. *Spink* ratified the law of nearly every circuit (other than the Ninth) by holding that the amendment (as opposed to the administration) of a plan does not implicate fiduciary duties under ERISA. *See* 116 S. Ct. at 1789 & n.4 (citing, *inter alia*, *Johnson v. Georgia-Pacific Corp.*, 19 F.3d 1184 (7th Cir. 1994)). The holding below cannot be squared with either *Spink* or numerous appellate cases both before and after that decision. *See* Pet. 10-13. Indeed, the panel majority in this case effectively resurrected the Ninth Circuit's aberrant approach firmly rejected by this Court in *Spink* itself.

The panel majority purported to distinguish *Spink* on a ground never mentioned in this Court's opinion — that the defined-benefit plan at issue there was funded wholly by the employer. As noted in the petition, this ostensible distinction itself brings the decision below squarely into conflict with *Georgia-Pacific*, which involved a defined-benefit plan to which employees had contributed, and expressly rejected the very arguments embraced by the Ninth Circuit in this case. *See* Pet. 14, 18-19; *see also Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Payonk v. HMW Indus., Inc.*, 883 F.2d 221, 225 (3d Cir. 1989).[2]

[2] Not surprisingly, the Third and Seventh Circuits have continued to follow these settled precedents after *Spink*. *See, e.g.*, *Frahm v. Equitable Life Assurance Soc'y*, 1998 WL 81457, at *1 (7th Cir. Feb. 27, 1998) (applying *Spink* and *Georgia-Pacific* to contributory welfare plan); *Engelhart v. Consolidated Rail Corp.*, 127 F.3d 1095 (3d Cir. 1997) (affirming, without comment, decision rejecting claim that amendment of contributory defined-benefit plan implicated fiduciary duties and triggered pre-termination rights), *cert. denied*, 118 S. Ct. 1163 (1998).

Respondents also suggest that the conflict with *Georgia-Pacific* can be harmonized on the theory that there, unlike here, no allegation was made of a transfer of funds from one plan to another. *See* Opp. 20-21. That suggestion is baseless for three reasons. *First*, respondents do not contend — and the Ninth Circuit did not hold — that the 1989 amendment establishing the early retirement program involved a transfer of funds from one plan to another. Accordingly, respondents' attempt to distinguish *Georgia-Pacific* applies by its own terms to only one of the two amendments at issue here.

Second, in any event, the 1991 amendment creating a contributory benefit structure cannot remotely be characterized as the creation of a new plan. Both before and after that new benefit structure was established, all benefits paid out under the Plan came from a common fund. *See* Pet. 20 n.6. As a matter of law, accordingly, there is but a single plan with multiple benefit structures, not separate plans. *See id.* (citing authorities); Brief *Amici Curiae* of the Hughes Aircraft Retirees Ass'n and the Hughes Employees Ass'n 6-12.[3]

[3] Respondents assert that petitioners have not "sought review" on this issue because it is not specifically set forth among the "Questions Presented" in the petition. *See* Opp. 4; *see also id.* at 5 & n.2, 12. The petition, however, challenged the opinion below as "flawed" on this very point, and noted that "[a]s a matter of law, the addition of a new benefit structure to an existing plan does not give rise to a new plan." Pet. 20 n.6. Contrary to respondents' assumption, it is well-established that a petitioner need not set forth a separate question with respect to each and every issue raised. This Court's Rules specify that the questions presented must be "short" and "concis[e]," and that "[t]he statement of any question presented is *deemed to comprise every subsidiary question fairly included therein*." S. Ct. Rule 14.1(a) (emphasis added). Whether participants in a defined-benefit plan can state a cause of action under ERISA by simply alleging that an amendment created a new plan is obviously subsidiary to the broader question whether participants in a defined-benefit plan can state a cause of action under ERISA to recover more than their defined benefits. *Cf. Missouri v. Jenkins*, 515 U.S. 70, 84-85 (1995); *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379-80 (1995).

Third, and more generally, fiduciary duties simply do not attach to the act of amending a plan, *regardless* of the nature of the relevant amendments. *See Spink*, 116 S. Ct. at 1789 ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). Indeed, respondents repeat the very error that the Ninth Circuit committed in *Spink* of addressing the question whether fiduciary duties have been violated before addressing the antecedent question whether such duties exist in the first place. *See id.* at 1788-89. Decisions from the Third and Tenth Circuits confirm that ERISA's fiduciary duties simply are not implicated by plan amendments, even where those amendments involve a use of plan assets that benefits members of other plans. *See Malia v. General Elec. Co.*, 23 F.3d 828, 833 (3d Cir.), *cert. denied*, 513 U.S. 956 (1994); *Salazar v. Sandia Corp.*, 656 F.2d 578, 579-80 (10th Cir. 1981).[4]

3. Respondents also assert that "[t]here is no conflict with other Circuits about employees' interest in their own contributions." Opp. 22. But they offer no support for that assertion, and fail to distinguish contrary authority from the Second, Third, and Seventh Circuits. *See* Pet. 16-20.

Respondents concentrate instead on arguing the merits of the issue, and here again their arguments are unavailing. Their principal argument rests on cases that have interpreted the asset-distribution provision of 29 U.S.C. § 1344. *See* Opp. 22-25. As the PBGC points out, however, plan participants have no entitlement to any "surplus" assets that may exist prior to plan termination, because any such "surplus" is wholly illusory

[4] Respondents' anti-inurement claim also fails for the same reasons that their fiduciary claims fail. ERISA's anti-inurement provision is the flip side of its fiduciary provisions: the former provision requires that plan assets not be used for the benefit of an employer, whereas the latter provisions require that plan assets be used for the exclusive benefit of plan participants. *Compare* § 1103(c)(1) *with* § 1104(a)(1)(A). Dismissal of the one therefore requires dismissal of the other, as even the Ninth Circuit recognized on remand in *Spink*. *See* 125 F.3d 1257, 1260-61 (9th Cir. 1997).

until the plan has been terminated and its liabilities satisfied. *See* PBGC Br. 13 ("[I]f there is no termination, there can be no surplus."); *Van Orman v. American Ins. Co.*, 680 F.2d 301, 313 (3d Cir. 1982) ("ERISA does not provide a pre-termination right to the surplus."). Because the Plan has not been terminated, "section 1344 cannot make the respondents' causes of action cognizable." PBGC Br. 16; *see also infra* at pp. 6-9.

Respondents' secondary reliance on the accrued-benefits provision of 29 U.S.C. § 1053 is equally unavailing. *See* Opp. 19-20, 23-24. Both parties agree that this provision imposes a floor on defined benefits: the level of such benefits cannot be set any lower than the amount that would be generated by the application of a statutory rate of interest. *See* Pet. 18 n.4; Opp. 23. There is a vast and obvious difference between this undisputed right to defined benefits at least as great as those generated by an imputed rate of interest (which is set forth in the plain text of the statute) and the asserted right to any and all investment income generated by employee contributions to a defined-benefit plan (which is conspicuously absent from the statute). The statute creates an explicit entitlement to *defined benefits* at or above a minimum level, not an implicit entitlement to any or all *assets* in a plan. Thus, as the Seventh Circuit explained in *Georgia-Pacific*, plan participants have no right to restrict an employer's use of plan assets to fund plan liabilities, because such participants "do not own the assets of a defined-benefit pension plan." 19 F.3d at 1186-90; *see also Brillinger v. General Elec. Co.*, 130 F.3d 61, 64 (2d Cir. 1997); *Malia*, 23 F.3d at 828-33 & n.2.[5]

[5] Respondents' reliance on a footnote in *Spink* regarding "otherwise unlawful" actions, *see* Opp. 7, likewise provides no basis for their claims. The *Spink* Court left open the possibility that a "sham transaction, meant to disguise an otherwise unlawful transfer," might implicate ERISA's fiduciary duties. 116 S. Ct. at 1792 n.8. The amendments at issue here are not "otherwise unlawful" for the simple reason that they do not violate any other provision of ERISA.

4. Respondents also defend the Ninth Circuit's holding that they have stated a legally cognizable claim by alleging that Hughes involuntarily (and unintentionally) terminated the Plan in 1991 by adding the non-contributory benefit structure. As noted in the petition and underscored by the PBGC, *see* Pet. 21-22; PBGC Br. 7-16, the statute could scarcely be more explicit on this point: the "[e]xclusive means of plan termination" are (1) voluntary termination initiated by an employer, 29 U.S.C. § 1341(a)(1); and (2) involuntary termination initiated by the PBGC, *id.* § 1342. *See also PBGC v. LTV Corp.*, 496 U.S. 633, 638-39 (1990); PBGC Br. 7-8 & n.4. The Ninth Circuit defied this statutory command by devising a third, nonstatutory termination mechanism: involuntary termination resulting from the amendment of a plan in some significant (but undefined) way.

Respondents suggest that this approach does not deviate from ERISA because such a termination could be carried out *prospectively* pursuant to the Title IV procedures. *See* Opp. 6-7, 25. That suggestion, however, contradicts the allegation in respondents' own complaint that Hughes "terminated the Plan within the meaning of ERISA" on "January 1, 1991" by creating the non-contributory benefit structure. App. 141a. *See also id.* at 132a ("Plaintiffs' [*sic*] further contend that the Plan was terminated on January 1, 1991, entitling the participants to an equitable distribution of the surplus assets."); *id.* at 134a ("Effective January 1, 1991 the Plan was terminated and replaced by a new non-contributory plan."). The Ninth Circuit accepted these allegations at face value, and held that respondents had stated a legally cognizable claim that "Hughes' amendment terminated the contributory plan in 1991," *id.* at 11a, pursuant to the common law of trusts, *see id.* at 11a n.3, 22a-23a.

That holding — which respondents conspicuously decline to defend — conflicts not only with the plain language of the statute, but also with decisions from other circuits confirming that ERISA provides the exclusive means of plan termination,

see Pet. 22-24, and rejecting attempts by plan participants to force employers to terminate plans and distribute putative "surplus" assets, *see Chait v. Bernstein*, 835 F.2d 1017, 1019-20 (3d Cir. 1988); *cf. Morgan v. Independent Drivers Ass'n Pension Plan*, 975 F.2d 1467, 1468, 1471 (10th Cir. 1992). As the PBGC explains, ERISA's provisions governing the termination of defined-benefit plans are the "key provisions" that "form the heart of the program administered by PBGC." PBGC Br. 2. Title IV authorizes one and only one mechanism for involuntary plan termination, and that mechanism can be initiated only by the PBGC under very limited circumstances not present here. *See* 29 U.S.C. § 1342; PBGC Br. 7-8 & n.4. Because the statute is clear on this point, there is no room for judicial embellishment. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 259-62 (1993). Thus, as the PBGC notes, the Ninth Circuit erred by "ignoring Title IV [and] holding that there may be a 'constructive' termination outside of Title IV." PBGC Br. 4-5.

Respondents argue that two of the cases cited by Hughes for the proposition that termination requires strict compliance with Title IV actually stand for the proposition that "a reluctant employer, in appropriate circumstances, can be ordered" to terminate a plan. Opp. 25 (citing *American Flint Glass Workers Union v. Beaumont Glass Co.*, 62 F.3d 574 (3d Cir. 1995), and *Phillips v. Bebber*, 914 F.2d 31 (4th Cir. 1990)). That contention distorts both cases, which simply note that courts can enforce an employer's *contractual* promise to terminate a plan voluntarily under specified circumstances. *See Beaumont Glass*, 62 F.3d at 580-81; *Phillips*, 914 F.2d at 34. Both cases thus fit comfortably within ERISA's framework, which allows employers to undertake obligations over and above those mandated by the statute, *see, e.g., Inter-Modal Rail Employees Ass'n v. Atchison, T. & S.F. Ry.*, 117 S. Ct. 1513, 1516 (1997), including an obligation to initiate a voluntary termination under specified circumstances. Needless to say, these principles have no application where, as here, an employer has not voluntarily undertaken to terminate a plan.

Respondents' attempt to negate the circuit conflict with respect to termination is thus unavailing. The Ninth Circuit is the only court of appeals ever to hold that a plan may be terminated by some means other than those expressly set forth in sections 1341 and 1342. That holding "casts aside the unambiguous statutory rules in Title IV of ERISA that have governed plan termination for almost a quarter of a century," PBGC Br. 3, and opens the floodgates to claims that employers "constructively" terminated plans by amending them. As underscored by petitioners' various *amici*, including the PBGC, the practical implications of the decision below are "disastrous." PBGC Br. 5.

Moreover, respondents have now made it clear that the termination issue is central to all of the other claims they have raised in this case. Their various allegations regarding violations of ERISA's fiduciary duties and structural provisions are inherently intertwined with their arguments about the supposed termination of the Plan. *See* Opp. 10-13, 17 n.8, 21, 22-23, 29. All of respondents' claims ultimately would lead the courts to rewrite the statute to accord themselves a broad discretionary role over the Nation's employee benefit plans, including not only pension plans but also health and 401(k) plans. *See* Brief *Amici Curiae* of the Chamber of Commerce of the United States of America and the Association of Private Pension and Welfare Plans 6-7, 14; Brief *Amicus Curiae* of the ERISA Industry Committee 4-5. From any perspective, therefore, the important issues of ERISA law raised in this case warrant review.

One final irony merits this Court's attention. Although respondents purport to represent a class of "all participants of the Plan who are or may become eligible to receive retirement benefits under the Plan," App. 133a, the Ninth Circuit's decision is opposed by long-established associations of both retired and current Hughes employees. *See* Brief *Amici Curiae* of the Hughes Aircraft Retirees Association and Hughes Employees Association. Such opposition is entirely sensible,

because this lawsuit threatens the very existence of the Plan that guarantees those current and former employees a steady and dependable income stream throughout their retirement years. The destabilizing decision below thus threatens not only plan sponsors, but also the very plan participants it purports to benefit. *See* PBGC Br. 4; App. 48a (Norris, J., dissenting). The real "pot of gold" in this lawsuit is for the class-action lawyers.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Petition and in the various *amicus* briefs, this Court should grant a writ of *certiorari*, and either summarily reverse the judgment below or set the case for plenary review.

Respectfully submitted,

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